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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No.

ROBERT LAMBERT, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT LAMBERT, Petitioner, prays that a writ of certorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on October 28, 1955.

OPINION BELOW

The opinion in the Court of Appeals (App., *infra*, pp. 3a-7a) is reported at 226 F. 2d, 602-604.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1955 (App., *infra*, p. 8a). Petition for rehearing was filed and denied by order dated November 30, 1955. (R. 89) Application for extension of time for filing a petition for writ of certiorari was presented, and an order was entered December 30, 1955, extending the time for filing said petition to January 28, 1956. (App., *infra*, p. 9a.) The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1). The jurisdiction of the United States District Court, for the Southern District of Florida was invoked under 18 U.S.C.A. 3231.

QUESTIONS PRESENTED

QUESTION NO. 1

THE RECORD (R. 14, 31, 32), SHOWS THE ARRESTING OFFICERS WERE W. R. THOMSON AND TOM WOOD. THOMSON TESTIFIED (R. 21) THAT, AFTER THE ARREST OF CO-DEFENDANT GILLYARD (WHO ADMITTED HIS GUILT), SUCH OFFICERS, PETITIONER BEING ABSENT, TOOK A STATEMENT FROM GILLYARD. HE DECLARED THAT PETITIONER WAS A PARTNER WITH HIM IN THE WHISKEY BUSINESS. ON MOTION (R. 22) THIS STATEMENT WAS STRICKEN FROM THE RECORD.

THEREAFTER (R. 35 as corrected), WITH OFFICER WOOD THE WITNESS, THE

FOLLOWING QUESTIONS AND ANSWERS APPEAR:

Q. (By the prosecutor "Were you in the presence of him when this was done?
A. I was. Mr. Thomson asked him was he working for Lambert at the time——.

Q. (By the prosecutor) Don't say anything that might involve Lambert. Give us the statement that Gillyard said in respect to himself. Nothing in reference to Lambert.
A. Arthur said he was in *partners* on the deal, —on the moonshine deal. (Emphasis added)

Q. (By the prosecutor) What sort of *partnership* was it, did he say—*profit sharing?* (Emphasis added)
A. Yes. When *they* sold the whiskey *they* divided the profits. (Emphasis added)

Q. (By the prosecutor) Between him *and the other individual?* (Emphasis added)
A. Yes.

Q. (By the prosecutor) Did he mention any other individual?
A. *He did.*" (Emphasis added)

DID SUCH OCCURRENCE PREJUDICE THE DEFENDANT LAMBERT AND DEPRIVE HIM OF HIS RIGHTS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

QUESTION NO. 2

PETITIONER, IN DAYLIGHT, ASSISTED THE OWNER OF TAX-UNPAID DISTILLED SPIRITS, IN MOVING PACKAGES, LATER SHOWN TO CONTAIN SAME, FROM A BUILDING, APPARENTLY CONTROLLED BY THE OWNER OF SAID SPIRITS (AND NOT IN ANY WAY SHOWN TO BE CONTROLLED BY PETITIONER) OUT INTO AN ADJACENT ALLEYWAY. PETITIONER THERE ASSISTED THE OWNER IN PLACING SOME OF SAID PACKAGES IN THE LATTER'S CAR, AND SOME ON THE GROUND ADJACENT TO THE CAR. PETITIONER HAD NO OWNERSHIP IN, NOR TITLE TO, SUCH PACKAGES, NOR THE SPIRITS THEREIN CONTAINED.

CAN PETITIONER, BY SO ASSISTING THE OWNER, BE DEEMED GUILTY OF POSSESSING SAID SPIRITS UNDER 26 U.S.C.A. 2803(a), OR BE DEEMED GUILTY OF SUCH SUBSTANTIVE OFFENSE UNDER 18 U.S.C.A. 2?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 26, Internal Revenue Code of the United States Code, Act Feb. 10, 1939, c. 2, 53 Stat. 303, amended June 24, 1940, c. 416, § 1, 54 Stat. 512, provides in part as follows:

26 U.S.C.A. 2803(a)* "Requirement. No person shall transport, possess, buy, sell or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. . . . "

*Now 26 U.S.C.A. § 5008 (b) (1).

Title 26, Internal Revenue Code, of the United States Code, Act Feb. 10, 1939, c. 2, 53 Stat. 401, provides in part as follows:

26 U.S.C.A. 3321 (a)* 'Penalty. Every person who removes, deposits or conceals, or is concerned in removing, depositing or concealing any goods

or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000.00 or be imprisoned for not more than 3 years, or both."

*Now 26 U.S.C.A. § 7206 (4).

Title 18, of the United States Code, entitled "Crimes and Criminal Procedure", Act June 25, 1948, c. 645, 62 Stat. 683, as amended Oct. 31, 1951, c. 655 § 176, 65 Stat. 717, provides as follows:

18 U.S.C.A. 2 (a) "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him would be an offense against the United States, is punishable as a principal."

STATEMENT OF FACTS

About 4:30 A.M., on July 29, 1954 (R. 14, 32), Gillyard having parked his car, in which he had driven up, in an alley adjacent to the house in question, made a telephone call. (R. 15, 32, 47, 55). It is conceded that he called Lambert. About 5:30 Lambert appeared. (R. 15, 28, 33, 34). He entered the alley where Gillyard's car was parked, onto which the house in question faced. He knocked on the door and entered the house, 358-a N. W.

20th Street, Miami, Florida. Gillyard and Lambert then carried from that house certain packages (R. 16, 17, 18, 19, 28, 33, 36), later (R. 18, 19, 30 and 34) shown to contain tax-unpaid distilled spirits. Each made three trips (R. 16, 17, 28, 33). The packages were placed in Gillyard's car (R. 16). The two then made a fourth trip (R. 17). On this fourth trip each was carrying a burlap bag containing a 5-gallon jug of distilled spirits (R. 17). Gillyard was arrested immediately after this fourth trip. Lambert ran and escaped (R. 18, 34). The house above mentioned was examined and thirteen 5-gallon jugs of distilled spirits were discovered in a kitchen or rear room (R. 18, 30). There was no furniture in the house (R. 19). But on the floor of the kitchen was a kerosene lamp (R. 19, 20). The lamp was seized (R. 20). Several weeks after Gillyard was arrested, Lambert came in and voluntarily surrendered (R. 20). Lambert's fingerprints were found on the seized lamp (R. 37-45, incl.). This lamp had been lighted by Gillyard about the time he first entered the house (R. 48), and he blew it out just before he was arrested (R. 48). The liquor belonged to Gillyard (R. 48, 49). There is *no evidence* to connect Lambert with the ownership of same. Lambert had nothing to do with the liquor (R. 49), except to assist Gillyard in carrying it in packages from the house to the car and the vicinity of the car. Gillyard and Lambert were not partners (R. 49). Gillyard was trying to sell some of the liquor to Lambert (R. 49). But Lambert never bought any of the liquor (R. 49). Gillyard had never previously sold any liquor to Lambert (R. 43). Gillyard alone had brought the liquor to the building, 358-a N. W. 20th Street from his home (R. 51). Gillyard claimed that one of the 5-gallon jugs in the car had been in the car when Gillyard drove to 358-a on the morning of his arrest. That it was

there for the purpose of sale to a person other than Lambert (R. 51). The testimony is that Lambert came down to buy "a little" of the liquor (R. 52).

REASONS FOR GRANTING THE WRIT

QUESTION ONE.

IMPROPER CONDUCT OF PROSECUTOR

There is one special circumstance to which I wish to direct the attention of the Court:

During the examination of the first witness, Thompson, in testifying about a statement made by the Defendant Gillyard *after his arrest* and transfer to the Marshal's office we find the following, (R. 21, 22):

> A. Officer Thompson: " . . . I then asked him some questions about the whiskey and about his connection with the whiskey. Gillyard stated to me that he was in the whiskey business on a profit sharing basis with "Little Jim", in response to a question when I asked him whether he was working for Little Jim, which is the nickname of Lambert. He is commonly known throughout the Negro section as Little Jim. He said he wasn't working for him. He worked with him on a profit sharing basis. They handled the whiskey and shared in any profits there might be.
>
> Mr. Roberts: I would like to move to strike that, and ask that the jury be instructed ac-

cordingly, in view of the fact that Lambert was not present.

The Court: The jury are so instructed. A statement made by one of the co-defendants can be only considered as respects to the guilt or innocense of that particular co-defendant, and not as respects to Lambert who was not present at that time."

No real criticism can be directed against the prosecutor on account of the circumstance, though as an experienced A. T. U. officer, the witness must have known that this statement was improper. But, after all, an A. T. U. agent cannot be too severely criticized for trying to "slip one over".

Nevertheless the Court took care of this situation in a proper manner by following the only practicable procedure available in our system of criminal procedure.

The Court's instructions *technically* cured any impropriety which occurred, and *theoretically* wiped the minds of *all* the jurors *clean* of any knowledge of any and all facts improperly testified to and stricken.

But, as every experienced trial lawyer knows, it is *not possible* to so wipe the knowledge gained from stricken testimony (such as that above quoted) out of the minds of jurors as one would wipe chalk marks from a blackboard with a wet sponge.

We submit, that it is doubtful if, in a close case, there ever was a jury in which one or more of the jurors

were not subconsciously affected by improper testimony given and then stricken.

In this case there was, patently, a paucity of testimony relevant to the charge upon which Defendant Lambert was convicted. We submit that the stricken testimony would have fallen into the class of *damnum obsque injuria*, even though one or more of the jurors, unconsciously, or in ignorance of the Court's instructions, took it into consideration, if it were not for the next line of questions asked by the prosecutor, and for the answers thereto, elicited from the witness.

These highly improper questions and answers, made the above quoted testimony (which, we submit, was still held in the minds of the jurors, though formally stricken from the record), extraordinarily damaging to the Defendant Lambert.

The witness Wood was on the stand and was being examined concerning the same statement by Gillyard which had been the subject of the improper testimony (R. 21, 22) when witness Thompson was on the stand.

When this series of improper questions was asked the witness, the examination was entering a new phase. Witness Wood had testified to examining the liquid at the scene of Gillyard's arrest. Then time elapsed while Gillyard was taken to the Marshal's office. There he was interrogated. Then the following transpired (R. 35, amended):

Q. (The prosecutor) "Were you in the presence of him when this was done?

A. (Officer Wood) I was. Mr. Thompson asked him was he working for Lambert at the time.

Q. Don't say anything that might involve Lambert. Give us the statement that Gillyard said about himself, nothing in respect to Lambert."

Up to this point the conduct of the prosecutor was above reproach, then follows:

A. "Arthur said he was partners on the deal—on the moonshine deal."

If this was the answer, or type of answer the prosecutor was trying to secure, the effort was improper. But, up to the giving of that answer, let us continue to assume that the prosecutor was striving to eliminate improper testimony. But, after the giving of that answer, the prosecutor abandoned his proper attitude and *co-operated fully* with the witness in bringing in the improper implication that Lambert was that partner, as is clear from the ensuing questions and answers.

Q. "What sort of *partnership* was it, did he say —*profit sharing?* (Emphasis added)
A. Yes. When they sold the whiskey they divided the profits.

Q. Between *him and the other individual?* (Emphasis added)
A. Yes.

Q. Did he mention any other individual?
A. *He did.*" (Emphasis added)

Now what purpose could it serve, when Gillyard was, in effect, confessing his complete guilt, to emphasize the fact that he *claimed to have a partner*, unless by implication to inject into the jury's mind that *that partner was the other person on trial*—Lambert. The Government was not interested in any other persons except, Gillyard and Lambert. So why drag in a supposed partnership except that, by implication, the juror's mind would be turned back to the stricken testimony.

Had it not been for Lambert's name first having been *improperly* injected into a partnership picture and then stricken, no harm could have come from a statement by Gillyard that he had a partner. But, at it was, this implication of partnership in the venture was fired at Lambert *deliberately and with deadly aim.* I think this Court will not be so naive as to not recognize the deadly and deliberately damaging effect of the questions, and the testimony then elicited as above quoted, in the light of what had previously transpired, and the lack of any point in dragging in a partnership situation, save to try and implant in the minds of the jury the thought that Lambert was that partner.

It is particularly significant that the prosecutor in framing his question used the words "profit sharing", which were the *exact* words used by the Witness Thompson (R 21) whose testimony on this point was stricken. This, manifestly, was intended by the prosecutor to remind the jury that Thompson, in the stricken testimony, had used those very words.

But it may be said, and it is true, that no exception was taken. Therefore, it will be urged: "It may have been error, but this grievous hurt is something concerning which Lambert can not complain."

We are quite well aware that, normally, an appellate court will not consider matters, which are alleged as error, for the first time on appeal.

Whether or not, when this manifestly damaging course was pursued by the Assistant U. S. Attorney, some affirmative action by way of objection or motion to the Court for an instruction to the jury, or motion for a mistrial, should have been taken is now beside the mark.

The futility of an objection and charge of the Court is well illustrated by the following observation of an appellate court.

> "As both appellants were tried together, and the evidence was admissible as to Monty, Smith's only safe course lay in the *dubious haven of a limiting instruction.* This course was neither sought nor thought of." (Emphasis added)
>
> *Smith v. U. S.*, 173 F. 2d 181, at p. 184 Col. 2

Notwithstanding the normal rule, above mentioned, the courts may still protect a defendant against grievous error. Just how grievous the error, and how damaging the incident, must be before the Court will invoke the salutary rule, we are unable to say.

The general rule has been well stated by this Court as follows:

> "In exceptional circumstances, *especially in criminal cases*, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of proceedings." (Emphasis added)
>
> *U. S. v. Atkinson*, 297 U.S. 157, 80 L. Ed. 555, at p. 557 Col. 1

The Court of Appeals, 5th Circuit, has well stated the rule as follows:

> "Appellant was convicted on two counts of an indictment charging violation of the Internal Revenue Code. He is here claiming reversible error in respect to the admission of evidence as to which no objection was made and no exception taken. The record standing thus, unless it is made to appear that the admission was an error of such magnitude as to deprive him of substantial justice, appellant may not now complain of it."
>
> *Law v. U. S.*, 177 F. 2d 283

We could undoubtedly find instances in which every court in the land has recognized this rule, but no good would be served by so doing. We copy excerpts from one more case and cite certain other authorities.

> "The admitted normal rule is that an appellate court will not consider matters which are alleged

as error for the first time on appeal, and this is true of criminal as well as civil cases. However, an exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would seriously affect the fairness, integrity, or public reputations of judicial proceedings."

Smith v. U. S., supra, at p. 184 Col. 2

"We must emphasize that, contrary to exhortations of appellee, we do not test 'manifest injustice,' by whether or not *we* are convinced of appellant's guilt. The test is rather whether the now contested evidence, in the light of all the facts of the case before the Court, so improperly prejudiced appellants in the eyes of the jury as to deny them a fair trial and thus require us to reverse, even though, *we* might feel that if the contested evidence was deleted, the jury would still have returned a finding of guilt."

Smith v. U. S., supra, at p. 186

We also cite the following pertinent cases:

Dillingham v. U. S., 5 Cir., 76 F. 2d 36

Moore v. U. S., 5 Cir., 161 F. 2d 932

Strickland v. U. S., 5 Cir., 155 F. 2d 167

Mitchell v. U. S., 208 F. 2d 854

Giles v. U. S., 144 F. 2d 860

Marco v. U. S., 26 F. 2d 315

QUESTION TWO

In presenting this question we do not comment on the second count of the indictment. (R. 1) The Court of Appeals inferentially conceded the insufficiency of the evidence as to that count when it said (App., *infra*, p. 6a):

> "The sentences being concurrent, we need not consider the adequacy of the proof on the concealment charge."

We ask the Court now to construe the word "possess" used in 26 U.S.C.A. 2803 (a) as used in the first count of the indictment (R. 1).

So far as we have discovered, all the authorities defining "possession", as used in this section, answer Question Two in the negative.

> "Possession is the exercise of such a power over a thing as attaches to lawful ownership."

U. S. v. Hodorowicz, 105 F. 2d 218, at p. 220 Col. 1

> "To be guilty of the charge of possession, plaintiff in error must have had such dominion and control of the liquor as would have given him the power of disposal, and the fact that he knew whiskey was to be had at the place in question, or that he transported it or bought it, is not enough."

Toney v. U. S., 67 F. 2d 573, at p. 574 Col. 1

We also cite:

Turner v. U. S., 192 F. 2d 41

Wiggins v. U. S., 99 F. 2d 184

U. S. v. Perfetti, 91 Fed. Supp. 909

The Court of Appeals, apparently, was of the opinion that what petitioner did could *not* be construed as "possession". (App., *infra*, p. 6a.) So, the court based its affirmance on the hypothesis that petitioner committed the substantive offence charged—"possession"—by aiding and abetting. There is, of course, in an appropriate case, no doubt about the propriety of such a holding.

It will be observed that 26 U.S.C.A. 2803(a) denounces five possible offenses; that is, (1) transportation, (2) *possession*, (3) buying, (4) selling, (5) transferring, tax-unpaid distilled spirits. Count 1 charges a single offense, that is, possession. Thus, if the facts do not establish beyond a reasonable doubt that the defendant Lambert was guilty of *possession*, the case should be reversed as to Count 1.

Moreover, we respectfully suggest, that, in a case such as the instant one, where the prosecutor deliberately chose to prepare an indictment which was not in the usual form (the usual form is to charge all five possible offenses), and charged one offense—possession—only, the act of aiding and abetting, which may make the defendant guilty of a substantive offense, should be an act directly germane to the substantive offense charged—possession—and not merely germane to an offense which *might* have been charged.

In this case, the Defendant Gillyard could, logically, have been charged, among other things, with "transportation". *But he was not.* Had Gillyard's charge included "transportation", petitioner would have had no defense to a conviction of aiding and abetting Gillyard.

We respectfully suggest that the Court of Appeals, being convinced that petitioner *was actually guilty,* by aiding and abetting, of the offense of "transportation" (which could have been charged), therefore felt that it was doing petitioner no injustice by holding that the act of aiding and abetting in "transportation" had some relationship to the offense charged, viz., "possession".

We earnestly and sincerely suggest that the Court of Appeals should not have strained at an interpretation of the evidence merely to bail out of trouble a prosecutor who had chosen not to prepare an indictment in the ordinary form.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

FRED BOTTS,
Attorney for Petitioner,
241 Shoreland Bldg.,
Miami, Fla.

JEROME G. GREENE,
Of Counsel
241 Shoreland Bldg.,
Miami, Fla.

January 1956.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15,429

ROBERT LAMBERT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(October 28, 1955.)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: The appellant, Robert Lambert, and Arthur Gillyard were charged in a four-count

indictment with violation of the Federal liquor laws. The District Court directed acquittal on two of the counts. A verdict of guilty was returned on the other two counts, one of which charged possession and the other charged concealment of untaxed liquor. 26 U.S.C.A. §§ 2803(a), 3321. Appellant was sentenced to two years in prison on each count to run concurrently. Although both Gillyard and appellant were convicted, only appellant has appealed.

The Government introduced evidence showing that officers observed Gillyard and appellant, around five-thirty on a July morning, carrying cartons, paper bags and burlap bags within which, it was later learned, were jugs of moonshine whiskey, from a duplex in Miami, Florida, to a car parked in front of the duplex. On the fourth trip from duplex to automobile the officers declared themselves and arrested Gillyard. Appellant fled but came in a couple of weeks later and voluntarily surrendered.

In the car were nineteen one-gallon jugs of moonshine whiskey. By the side of the car were three five-gallon jugs of like contents. The officers went into the duplex and found in it thirteen five-gallon jugs of moonshine and other jugs with small amounts, aggregating about a gallon, of whiskey. The duplex was vacant and, except for the liquor and empty jugs, a kerosene lamp bearing appellant's fingerprints was the only article found within it.

Gillyard took the stand, admitted ownership of the liquor, denied that appellant had carried any of it, said that appellant discussed buying liquor from him, but that

no deal was made. Gillyard admitted the ownership and possession of the 100 gallons of moonshine. He asserted that appellant never was in the room of the duplex where the lamp was found.

Appellant testified that he was never in the room with the lamp, that he had nothing to do with the shine and carried none of it. He said he ran away because Gillyard had the shine and he, the appellant, had no business there.

During the direct examination of Tom Wood, Supervisor of the Florida State Beverage Department and a witness for the Government, the following transpired:

"Q. [By the United States Assistant District Attorney] After Gillyard was arrested were any statements made to you by him?

A. [By the witness, Tom Wood] Mr. Thomson warned Arthur of his constitutional rights.

Q. Were you in the presence of him when this was done?

A. I was. Mr. Thomson asked him was he working for Lambert at the time—

Q. Don't say anything that might involve Lambert. Give us the statement that Gillyard said in respect to himself. Nothing in reference to Lambert.

A. Arthur said he was in partners on the deal—on the moonshine deal.

Q. What sort of partnership was it, did he say—profit sharing?
A. Yes. When they sold the whiskey they divided the profits.

Q. Between him and the other individual?
A. Yes.

Q. Did he mention any other individual?
A. He did."

The appellant contends that the evidence is insufficient to sustain his conviction on either of the two counts. As to possession, the evidence was conflicting and presented a jury question which was resolved against the appellant. The sentences being concurrent, we need not consider the adequacy of the proof on the concealment charge. *Brown v. United States*, 5th Cir. 2 F. 2d 589, Cer. den. 268 U. S. 702, 45 S. Ct. 638, 69 L. Ed. 1166.

In any event there was possession by Gillyard of untaxed liquor. The appellant admitted he knew it was shine. There was evidence that appellant made three trips with liquor from the duplex to the car. One who aids or abets the commission of an offense is a principal. 18 U.S.C.A. §2. An aider and abettor may be indicted, tried and convicted as a principal. *Russell v. United States*, 5th Cir. 1955, 222 F. 2d 197, and cases there cited. We cannot escape the conclusion that there was more than ample evidence from which the guilt of appellant as an aider and abettor might have been found.

With great intensity the appellant urges that, although he made no objection to nor request that the jury be directed to disregard the language of the prosecutor

above quoted in the examination of the witness Tom Wood, error was committed so prejudicial that it should have our consideration and that a reversal should result. Fed. R. Crim P. 52(b). As in *Beavers v. United States*, 5th Cir. 1953, 204 F. 2d 88, "the appellant finds himself in the exceedingly difficult position of trying to put the trial judge in error in respect of matters which, if error, could have been cured, if the judge had been given an opportunity to correct them." We hold here as this Court heretofore held that:

> "While in the case of serious and manifest errors this failure (to make objections) would not preclude our consideration of them, we find no such errors here as would justify our disregarding the general rule that only errors brought to the attention of the trial court, so that the court may have an opportunity for correction if necessary, will be considered on appeal." Feutralle v. United States, 5th Cir. 1954, 209 F. 2d 159.

The principle so announced is so well established that this opinion need not be lengthened by reference to other decisions, of which there are many, of like holding.

We find no reversible error in the record and the judgment of conviction of the appellant is

AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR., Clerk
By GILBERT F. GANUCHEAN,
Deputy.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

JUDGMENT

Extract from the Minutes of October 28, 1955.

ROBERT LAMBERT,

No. 15429 versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

A True Copy
Teste:

JOHN A. FEEHAN, JR., Clerk,
U. S. Court of Appeals,
Fifth Circuit

By GILBERT F. GANUCHEAN,
Deputy.

New Orleans, Louisiana
January 5, 1956

SUPREME COURT OF THE UNITED STATES

No. ——

October Term, 1955

ROBERT LAMBERT,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 28th, 1956.

TOM C. CLARK,
Associate Justice of the Supreme Court of the United States.

Dated this 30th day of December, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 645

ROBERT LAMBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 80-84; Pet. 3a-7a) is reported at 226 F. 2d 602.

JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1955 (R. 85; Pet. 8a) and a petition for rehearing (R. 86-87) was denied on November 30, 1955 (R. 89). The time for filing the petition for a writ of certiorari was extended by Mr. Justice Clark to January 28, 1956 (Pet. 9a), and it was filed on January 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission in evidence without objection of a co-defendant's statement after arrest that he sold whiskey in partnership with another individual constituted reversible error as to petitioner.

2. Whether there was sufficient evidence to support the conviction.

STATUTES INVOLVED

The statutes involved provide in pertinent part:

26 U.S.C. 2803 (now 26 U.S.C. 5008(b)(1) and 5642):

(a) No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
[The tax is imposed by section 2800 thereof, now 5001]

* * * * *

(g) Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

26 U.S.C. 3321(a) (now 26 U.S.C. 7206(4)):

> Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

STATEMENT

A jury found petitioner guilty under an indictment which charged him and one Arthur Gillyard [1] with unlawful possession (count 1) and concealment (count 2) of distilled spirits in violation of 26 U.S.C. [1952 ed.] 2803(a) and 3321 [2] (R. 1-2). He was sentenced to concurrent terms of imprisonment of two years on each count (R. 9). On appeal, the judgment of conviction was affirmed (R. 85, Pet. 8 a).

The evidence adduced at the trial may be summarized as follows:

About 4:30 a. m. on July 29, 1954, investigator Thompson of the Alcohol Tax Division, Treasury Department, accompanied by Tom Wood, an investigator from the Florida State Beverage Department, saw co-defendant Gillyard, who had ar-

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[1] Gillyard was also found guilty but he did not appeal (R. 70).

[2] Counts 3 and 4 of the indictment also charged internal revenue violations, but the court directed verdicts of acquittal as to them, on the ground that they were repetitious of counts 1 and 2 (R. 2-3, 64).

rived by car and had parked near a house located on N.W. 20th Street, Miami, Florida, make a telephone call from a nearby restaurant (R. 14-15, 31, 32). Gillyard subsequently testified that the call was to petitioner (R. 47). Approximately an hour later, petitioner arrived and went into the house. Within a short time petitioner and Gillyard left the house, each carrying packages which they loaded into the car. (R. 16, 33.) After three such trips, petitioner and Gillyard came out carrying burlap bags which they set on the ground near the back of the car. When petitioner opened the trunk while Gillyard was standing nearby watching, the officers walked up to them, and identified themselves, and placed both under arrest. (R. 16-18, 33-34.) Petitioner escaped (R. 18, 34).

The paper bags and burlap bags which petitioner and Gillyard had carried contained five-gallon and one-gallon jugs full of whiskey which did not bear the required federal tax stamps (R. 18-19, 34-35). In the house, the officers found no furniture except a kerosene lamp, which contained petitioner's fingerprints (R. 19-20, 39-41, 45-46). On the floor in the kitchen they found 13 five-gallon jugs full of whiskey, none of which bore the required federal tax stamps (R. 19, 34-35).

Several weeks later, petitioner surrendered to the police (R. 20, 22).

Petitioner and Gillyard testified to the effect that all of the whiskey belonged to Gillyard, that Gillyard carried the whiskey to the car himself, that Gillyard was interested only in selling whiskey

to petitioner, that all that petitioner did was to help Gillyard open the trunk of the car at Gillyard's request, that they were not partners in the moonshine whiskey business, and that petitioner never entered the house where the whiskey was stored (R. 48-49, 55-58).

ARGUMENT

1. During Treasury Agent Thompson's direct testimony he testified that he talked with Gillyard after his arrest, and that the following had occurred (R. 21-22):

> * * * Gillyard stated to me that he was in the whiskey business on a profit sharing basis with "Little Jim", in response to a question when I asked him whether he was working for "Little Jim", which is the nickname of Lambert. He is commonly known throughout the negro section as "Little Jim". He said he wasn't working for him. He worked with him on a profit sharing basis. They handled the whiskey and shared in any profits there might be.
>
> Mr. ROBERTS [Defense Counsel]: I would like to move to strike that, and ask that the jury be instructed accordingly, in view of the fact that Lambert was not present.
>
> The COURT: The jury is so instructed. A statement made by one of the co-defendants can be only considered as respects to the guilt or innocence of that particular co-defendant, and not as respects to Lambert who was not present at that time.

Subsequently during officer Wood's direct testimony, he testified as follows (R. 35 as corrected R. 91):

> Q. After Gillyard was arrested were any statements made to you by him?
>
> A. Mr. Thompson warned Arthur [Gillyard] of his constitutional rights.
>
> Q. Were you in the presence of him when this was done?
>
> A. I was. Mr. Thompson asked him was he working for Lambert at the time.
>
> Q. Don't say anything that might involve Lambert. Give us the statement that Gillyard said in respect to himself. Nothing in reference to Lambert.
>
> A. Arthur said he was in partners on the deal,—on the moonshine deal.
>
> Q. What sort of partnership was it, did he say—profit-sharing?
>
> A. Yes. When they sold the whiskey they divided the profits.
>
> Q. Between him and this other individual?
>
> A. Yes.
>
> Q. Did he mention any other individual?
>
> A. He did.

Petitioner attributes (Pet. 8-15) prejudicial error to Wood's testimony on the ground that it implicated petitioner, although inadmissible as to him. He argues that when such testimony is combined with the stricken Thompson testimony quoted above, which specifically names petitioner as Gill-

yard's partner, Wood's testimony in effect pointed to petitioner as a partner. But this is obviously a case in which it was proper to try the two defendants together, and, manifestly, it was proper to admit against Gillyard statements which he had voluntarily made. The judge carefully and immediately instructed the jury to disregard Thompson's testimony as to petitioner and to consider it solely as to Gillyard. It is presumed that the jury followed the court's instruction. *Opper* v. *United States,* 348 U.S. 84, 95.

Furthermore, petitioner failed to object to the admission of Wood's testimony and is in no position to complain now. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 238-239; *Holmgren* v. *United States,* 217 U.S. 509, 523; *Allis* v. *United States,* 155 U.S. 117, 122.

2. Petitioner's attack (Pet. 16-18) upon the sufficiency of the evidence to support the verdict is amply refuted by the record (see Statement, *supra,* pp. 3-4). It is true that petitioner and Gillyard denied petitioner's possession of the whiskey. The government's evidence, however, was clear that petitioner was in the house and helped carry out the bags with the whiskey. The jury had the right to disregard defense testimony to the contrary. The conflict in evidence was a matter to be determined by the jury (*Lutfy* v. *United States,* 198 F. 2d 760 (C.A. 9); *Bridgman* v. *United States,* 183 F. 2d 750 (C.A. 9)), and the jury resolved it against the petitioner.

Both courts below having found the evidence sufficient to support the conviction, there is no occasion for further review by this Court. See *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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